

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-4204

No. 75-4204

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OLIN CONSTRUCTION CO., INC.,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION AND
SECRETARY OF LABOR,

Respondents.

ON PETITION TO REVIEW AN ORDER OF THE
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

BRIEF FOR THE SECRETARY OF LABOR

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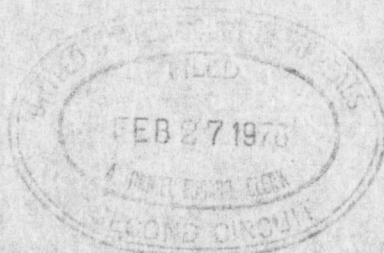
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and
JOHN T. DUNLOP, SECRETARY OF LABOR,

Respondents.

ON PETITION TO REVIEW AN ORDER OF THE
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BRIEF FOR THE SECRETARY OF LABOR

COUNTERSTATEMENT OF ISSUE PRESENTED

Whether substantial evidence supports the Review Commission's finding that Olin committed a serious violation of 29 C.F.R. 1926.652(b), the Secretary's trenching-safety standard.

COUNTERSTATEMENT OF THE CASE

1. Nature of the case

This case is before the Court pursuant to section 11(a) of the Occupational Safety and Health Act of 1970 (OSHA) (84 Stat. 1590, 29 U.S.C. 651 et seq.) on Olin's petition to

review an order of the Occupational Safety and Health Review Commission issued against it on July 23, 1975 (App. 6-7).^{1/} This Court has jurisdiction under 29 U.S.C. 660(a), the violation found having occurred in Poughkeepsie, New York.

2. Facts found by the Commission

Olin is a large interstate construction company which does an annual business of over \$5 million and employs 150 persons daily (App. 11; 40-41). On June 18, 1973, it was engaged in digging trenches and installing a 12" water main along Route 55 in Poughkeepsie, and as part of this operation a company work crew was digging a test trench in order to locate an electrical conduit which crossed the main trenching line (App. 13; 101-102, 142). Early that afternoon, as OSHA compliance officer Edward Scott was driving east on Route 55 he observed this test trenching operation in progress and stopped to conduct a routine safety inspection (App. 11-12; 42-44). Scott immediately noticed that three employees at the trench site were standing at ground level and two were working in the trench (App. 12; 44). As Scott arrived at the trench, Olin job foreman Seelman identified himself and confirmed that he and a second employee had been working at the trench bottom (App. 12; 44-45). The trench was discovered to be approximately 2-1/2 feet wide, 15 feet long and 6 feet deep,^{2/} and was dug in unstable fill

^{1/} "App." references are to the printed Appendix lodged with the Court. Those references preceding a semicolon are to the Administrative law judge's findings and conclusions; those following, to the supporting evidence.

^{2/} During the inspection, company foreman Seelman confirmed these dimensions as representing accurate approximations of

(continued)

material of sandy, gritty consistency which was likely to crack or crumble and looked as though it could move at any moment (App. 12, 13; 46, 54, 96). The walls of the trench were nearly vertical, and both heavy traffic on Route 55 and immediately adjacent construction machinery further increased their instability (App. 12; 46, 63). The trench was completely unbraced and was neither shored, sloped nor otherwise protected against collapse (App. 13; 47).

After making these observations inspector Scott discussed the violation at length with Olin head foreman Schreppel, who neither disputed Scott's measurements nor sought to remeasure the trench himself despite the fact that two men were standing next to it (App. 121, 128, 131, 138).^{3/} As they were talking part of the trench wall collapsed and slid into the trench at precisely the point where Olin's employees had been working (App. 50, 126-127).

2/ Continued

the trench's length and width (App. 12; 45). With respect to the depth of the trench, Seelman produced a 72-inch wooden fold-out rule and kneeling on the north side of the excavation, placed the bottom of the rule in the excavation at the point where the men had been working. Compliance officer Scott then proceeded to the opposite side of the trench, squatted down to within an inch or two of ground level, and observed the 72-inch marker to be only one or two inches above the grade. He thus approximated the depth of the trench to be 6 feet--a measurement also confirmed by Seelman (App. 12; 47-48, 70-72).

3/ Later that afternoon the trench was backfilled, on Schreppel's orders, preventing remeasurement (App. 131).

3. Administrative proceedings

As a result of this inspection the Secretary the same day cited Olin for a serious violation of the Department's trench-safety requirements (App. 18-20).^{4/} Olin was also served with

4/ Section 5(a)(2) of the Act, 29 U.S.C. 654(a)(2), provides every employer affecting commerce "shall comply with occupational safety and health standards promulgated under this Act." Olin was initially cited under 29 C.F.R. 1926.652(a), but a violation of 29 CFR 1926.652(b) was tried by consent and substituted for the initial citation without objection (App. 14-15). That standard provides with respect to trenching operations that:

(b) Sides of trenches in unstable or soft material 5 feet or more in depth, shall be shored, sheeted, braced, sloped, or otherwise supported by means of sufficient strength to protect the employees working within them. See Tables P-1, P-2 ***.

Table P-1 recommends a 45-degree slop for "Average soils" and specified that "Clays, Silts, Loams or Non-Homogeneous Soils Require Shoring and Bracing." In addition, 29 CFR 1926.652(e) requires that "Additional precautions***shall be taken to prevent slides or cave-ins when***trenches are made in locations adjacent to backfilled excavations, or [are]***subjected to vibrations from***highway traffic, the operation of machinery, or any other source."

Section 17(k), 29 U.S.C. 666(j), provides that a "serious" violation exists where "there is a substantial probability that death or serious physical harm could result. . . unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." Section 17(c), 29 U.S.C. 666(c), defines a non-serious violation as one which is "not *** serious." Olin was also cited for a nonserious violation of another standard which is not before the Court on this appeal. 29 U.S.C. 659(a).

a proposed penalty of \$500 for this violation and ordered to abate the hazardous condition immediately (App. 19). The company timely contested the citation pursuant to 29 U.S.C. 659(c) and the Secretary's formal complaint before the Commission issued July 16, 1973, (App. 21, 23-29). Olin's answer followed, and on September 25, 1973, the case was heard by the Commission's administrative law judge (App. 30-32, 33). The judge's decision affirming the Secretary's serious citation and proposed penalty issued March 29, 1974, (App. 8-17), the Commission timely directed discretionary review of this decision pursuant to 29 U.S.C. 661(i), and its 1-1 decision affirming the judge followed (App. 6-7).

4. Decisions below

On the above record the Commission judge flatly affirmed the Secretary's citation, inter alia finding "There is little dispute that the trench was dug in ground which is characterized as fill ***, or that the trench was not shored," that it was over 5 feet deep by on-site agreement of Scott and foreman Seelman, and that "any [such] trench *** in fill soil with perpendicular walls presents a substantial probability that death or ^{serious} physical harm could result to a person standing *** therein." (App. 12-13, 14, 15). Further the judge rejected as "subject to several infirmities," job foreman Schreppel's attempt to establish from a June 19 trench that the June 18 trench inspected by officer Scott was less than 5 feet deep. In support of this result the judge noted that the June 19 trench was several feet from the one cited; that the June 18 trench was deeper;

and that Schreppel's memory concerning the depth of the June 18 trench and other facts crucial to this defense was "not clear" (App. 13-14). Finally, the judge noted Olin's failure either to call foreman Seelman and the other employees present during the inspection or explain their absence despite the fact their testimony would "have been important corroboration under the circumstances of this case" (App. 14). He accordingly credited inspector Scott in all respects and affirmed the Secretary's citation (App. 15-17).

On review, an equally divided Commission affirmed the judge's decision (App. 6-7). Olin's petition for review by this Court followed.

ARGUMENT

THE COMMISSION'S ORDER IS SUPPORTED BY SUBSTANTIAL EVIDENCE

1. As detailed supra, on June 18, 1973, the Secretary cited Olin for failing to brace, slope or otherwise protect against collapse the sides of a six-foot-deep trench dug in soft unstable soil.^{5/} The judge and Commission affirmed

^{5/} The Courts have frequently examined the Act's preventive purposes, scope and operation, which need not be repeated here. E.g., National Realty and Const'n. Co. v. OSHRC and Secretary, 489 F.2d 1257 (C.A. D.C., 1973); Brennan v. OSHRC and John J. Gordon Co., 492 F.2d 1027 (C.A. 2, 1974); REA Express, Inc. v. Brennan and OSHRC, 495 F.2d 822 (C.A. 2, 1974); Brennan v. OSHRC and Underhill Construction Corp., 513 F.2d 1032 (C.A. 2, 1975); Olin Construction Co., Inc. v. OSHRC and Dunlop, 525 F.2d 464 (C.A. 2, 1975).

this violation, and the record fully supports this result. Thus, inspector Scott testified that as a result of measurements taken at the trench site, he fixed its depth at approximately 6 feet. Company foreman Seelman assisted Scott in this measurement and agreed the trench was approximately 6 feet in depth; and head foreman Schreppel, who arrived at the job site while the inspection was in progress, neither disputed this dimension nor sought to remeasure the trench himself. Supra, p. 3 . Undisputed evidence further demonstrated that the trench was dug in loose, unstable fill which was "sandy and gritty," "likely to crack," and looked as though "it could move at any moment" (App. 46, 54, 96, 135, 157); that the presence of heavy traffic on Route 55 and machinery adjacent to the trench increased its instability (App. 46), and that a section actually collapsed during the inspection. Supra, p. 3 . Finally it was undisputed that the walls of the trench were nearly vertical (App. 46, 63); that the trench was completely unbraced and neither shored, sloped nor otherwise supported to protect the employees working within it against collapse (App. 47); and that if a cave-in occurred under these circumstances "it would cause serious physical harm and possibly death" (App. 52). On this record, the judge's conclusion that Olin committed a serious safety violation by permitting its employees to work in an unstable unprotected 6-foot excavation was plainly correct and should

be affirmed. NLRB v. United Ins. Co., 390 U.S. 254, 260 (1968); NLRB v. Orleans Mfg. Co., 412 F.2d 94, 94-96 (C.A. 2, 1969); Olin Construction Co. v. OSHRC and Brennan, supra.

2. No different result is required by Olin's attempt (Br., pp. 8-11) to upset the judge's credibility determinations on the ground Scott's observations were "eyeball" and illogical. As petitioner is well aware, such agency determinations "are essentially nonreviewable unless contradicted by 'uncontrovertible documentary evidence or physical facts.'" Olin Construction Co. v. OSHRC and Brennan, supra, 525 F.2d at 467. Olin has not only failed to point to such evidence, but establishes the accuracy of Scott's observations in the attempt.

Thus, even if Scott's measurement was purely visual, petitioner has neither asserted nor shown why such observations of physical facts were not entitled to credit. Compare NLRB v. Knight Morley, 251 F.2d 753, 758 (C.A. 6, 1957); Walton Mfg. Co. v. NLRB, 286 F.2d 26, 28 (C.A. 5, 1961). ^{6/} Moreover, that measurement was not purely visual, since it was based on the fact that a six-foot rule extending to the trench bottom emerged only one or two inches above the excavation's top. Supra, n.2. For similar reasons Olin's

^{6/} The Commission has not, as petitioner suggests (Br., p. 8) "indicated" that such measurements are not acceptable. Indeed in Dedona Contracting Corp., OSHRC No. 7635, 3 CCH ESHG Para. 19,932 (Aug. 1975), where the inspector merely looked at an excavation and estimated its dimensions, the judge found the "estimates" sufficient.

assertion the men in the trench would have had to be "seven feet in height" under Scott's theory (Br., p. 11) cannot prevail. The contention assumes Scott was looking at the trench from ground level rather than from a vantage point which afforded a downward sight line, and ignores the entirely reasonable possibility he could have seen the upper part of the men in the trench even if it were over five feet deep. ^{7/}

On this record---and particularly in light of Scott's testimony that Seelman corroborated his measurement and the company's utter failure to explain why it did not call Seelman to rebut---the judge's credibility resolutions were proper. E.g., Interstate Circuit v. United States, 306 U.S. 208, 225-226 (1939); NLRB v. Dorn's Transp. Co., 405 F.2d 706, 713 (C.A. 2, 1969).

3. Nor, finally, is a different result required by the fact (Pet. Br., pp. 7-8) the judge's order was apparently based on a substantial-evidence rather than a preponderance test. The short answer is this Court has expressly rejected as harmless error the same contention in identical circumstances, noting, however, that it was "not watering down the applicability of the preponderance of evidence rule, which we emphasize

^{7/} In any event, even under petitioner's scenario, the presence of average 6-foot men in the trench would have established its depth at 5 feet if--as is undisputed--only their heads and shoulders were visible.

must be strictly adhered to by Administrative Judges."

Olin Const'n. Co., supra, 524 F.2d at 466-467. We entirely agree with this statement, but note that the instant judge's decision was rendered virtually at the same time as the judge's decision in Olin I, supra; that the Commission has long since directed its judges to apply the correct test, Armor Elevator, OSHRC No. 425, 426, 1973-74 CCH OSHD Para. 16,958 (1973); and that its failure to mention this issue here means it too believed the asserted error harmless. Moreover, here, as in Olin I, the supporting evidence was "so overwhelming that it would be a miscarriage of justice to rule otherwise," and the resulting order was based on credibility resolutions which would not have differed under either test. Olin I, supra, 524 F.2d at 467. ^{8/}

^{8/} Olin quite surprisingly asserts the \$500 penalty assessed here is unjust, citing what it considers to be the judge's erroneous reliance on a New York State inspector's testimony concerning an Olin trench-shoring violation on the same job some four days prior to the instant inspection. Apart from the fact un rebutted record evidence shows, and the judge expressly found, that the two situations were substantively identical (App. 15-16; 54, 57, 63-65), this assertion comes with ill-grace from a company which was given a second bite at the apple where the safety of its employees was concerned. Moreover, the judge's consideration of this incident was entirely proper, since the Act provides that when assessing penalties "due consideration" shall inter alia be given to "the good faith of the employer, and the history of previous violations." 29 U.S.C. 661(i). Finally, as this Court noted in the predecessor case, "As for the penalties, we are amazed at their paucity, reflecting more of a license than a penalty." Olin I, supra, 524 F.2d at 467 (\$800 penalty).

CONCLUSION

For the above reasons the petition should be denied
and the Commission's order affirmed and enforced forthwith.
29 U.S.C. 660(a).

Respectfully submitted,

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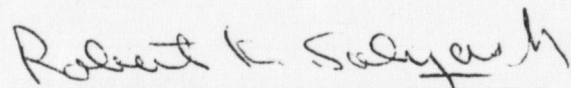
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